Black, J.

Supreme Court of the United States

OCTOBER TERM, 1960

N[redacted] 66

ISADORE BLAU, a stockholder of Tide Water Associated Oil Company, suing on behalf of himself and all other stockholders similarly situated and on behalf of and in the right of Tide Water Associated Oil Company,

Petitioner,

—against—

ROBERT LEHMAN, ALLAN S. LEHMAN, JOHN HERTZ, JOHN M. HANCOCK, MONROE C. GUTMAN, PAUL M. MAZUR, WILLIAM J. HAMMERSLOUGH, FRANCIS A. CALLERY, FREDERICK L. EHRMAN, JOHN R. FELL, WILLIAM S. GLAZIER, PHILIP H. ISLES, HERMAN H. KAHN, EDWIN L. KENNEDY, FRANK J. MANHEIM, PAUL E. MANHEIM, MORRIS NATELSON, HAROLD J. SZOLD and JOSEPH A. THOMAS, a co-partnership, doing business under the firm name and style of Lehman Brothers, JOSEPH A. THOMAS, and TIDE WATER ASSOCIATED OIL COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENTS OTHER THAN TIDE WATER ASSOCIATED OIL COMPANY IN OPPOSITION

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Supreme Court of the United States

October Term, 1960

Isadore Blau, a stockholder of Tide Water Associated Oil Company, suing on behalf of himself and all other stockholders similarly situated and on behalf of and in the right of Tide Water Associated Oil Company, *Petitioner,* —*against*— Robert Lehman, Allan S. Lehman, John Hertz, John M. Hancock, Monroe C. Gutman, Paul M. Mazur, William J. Hammerslough, Francis A. Callery, Frederick L. Ehrman, John R. Fell, William S. Glazier, Philip H. Isles, Herman H. Kahn, Edwin L. Kennedy, Frank J. Manheim, Paul E. Manheim, Morris Natelson, Harold J. Szold and Joseph A. Thomas, a copartnership, doing business under the firm name and style of Lehman Brothers, Joseph A. Thomas, and Tide Water Associated Oil Company, *Respondents.*	No. 810

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF RESPONDENTS OTHER THAN TIDE WATER ASSOCIATED OIL COMPANY IN OPPOSITION

Question Presented

(a) Where a partnership buys and sells securities of an issuer within a period of six months, and

(b) where a member of the partnership is a member of the Board of Directors of the issuer, and

(c) where the partner-director did not consult the firm with reference to the purchase or sale or with reference to any of the affairs of the issuer and disassociated himself from the transaction as soon as he first learned of it, and

(d) where the partner-director, in fact, received none of the profits of the transaction—was not the Court of Appeals correct in holding that the partnership was not liable to account to the issuer for its profits and that the partner-director was not liable for more than what would have been his pro rata share had he received it?

Statute Involved

The relevant sections of the Securities Exchange Act of 1934 provide:

> Section 3(a) (Title 15 U. S. C. § 78c(a)) "When used in this chapter, unless the context otherwise requires—
>
> * * *
>
> (7) The term 'director' means any director of a corporation or any person performing similar functions with respect to any organization, whether incorporated or unincorporated."
>
> Section 16(a) (Title 15 U. S. C. § 78p(a)) "Every person who is directly or indirectly the beneficial owner of more than 10 per centum of any class of any equity security (other than an exempted security) which is registered on a national securities exchange, or who is a director or an officer of the issuer of such security, shall file, at the time of the registration of such security or within ten days after he becomes such beneficial owner, director, or officer, a statement with the exchange (and a duplicate original thereof with the Commission) of the amount of all equity securities of such issuer of which he is the beneficial owner, and within ten days after the close

of each calendar month thereafter, if there has been any change in such ownership during such month, shall file with the exchange a statement (and a duplicate original thereof with the Commission) indicating his ownership at the close of the calendar month and such changes in his ownership as have occurred during such calendar month."

Section 16(b) (Title 15 U. S. C. § 78p(b)) "For the purpose of preventing the unfair use of information which may have been obtained by such beneficial owner, director, or officer by reason of his relationship to the issuer, any profit realized by him from any purchase and sale, or any sale and purchase, of any equity security of such issuer (other than an exempted security) within any period of less than six months, unless such security was acquired in good faith in connection with a debt previously contracted, shall inure to and be recoverable by the issuer, irrespective of any intention on the part of such beneficial owner, director, or officer in entering into such transaction of holding the security purchased or of not repurchasing the security sold for a period exceeding six months. Suit to recover such profit may be instituted at law or in equity in any court of competent jurisdiction by the issuer, or by the owner of any security of the issuer in the name and in behalf of the issuer if the issuer shall fail or refuse to bring such suit within sixty days after request or shall fail diligently to prosecute the same thereafter; but no such suit shall be brought more than two years after the date such profit was realized. This subsection shall not be construed to cover any transaction where such beneficial owner was not such both at the time of the purchase and sale, or the sale and purchase, of the security involved, or any transaction or transactions which the Commission by rules and regulations may exempt as not comprehended within the purpose of this subsection."

Section 23(b) (Title 15 U. S. C. § 78w(b)) "The Commission and the Board of Governors of the Federal Reserve System, respectively, shall include in their annual reports to Congress such information, data, and recommendation for further legislation as they may deem advisable with regard to matters within their respective jurisdictions under this chapter."

Statement

Defendant Joseph A. Thomas was, at the time of the transaction involved, a member of the firm of Lehman Brothers, and a director of Tide Water Associated Oil Company ("Tide Water"). On the basis of the evidence adduced at the trial, the District Court found as a fact that the invitation to Thomas to join the Tide Water board was upon Tide Water's initiative and that Thomas accepted the directorship because of his interest in the oil business and the prestige to be gained in serving on the board of directors of a large corporation (R. 150a).* The District Court found that there was no evidence that Lehman Brothers had deputized Thomas to represent its interests as a director on the Tide Water board (R. 153a).

Between October 8, 1954 and November 15, 1954, acting solely on the basis of two newspaper articles (R. 151a), Lehman Brothers purchased in the regular course of its business 50,000 shares of Tide Water common stock at an aggregate cost of $1,330,800 (R. 150a). On December 8, 1954, pursuant to a plan of recapitalization, Lehman Brothers exchanged its 50,000 shares of Tide Water com-

*References preceded by the letter "R." are to pages of the Joint Appendix filed with the United States Court of Appeals for the Second Circuit. The other record references are to the appendix to the petition.

mon stock for 50,000 shares of a new preferred stock (R. 151a). Between December 9, 1954 and March 8, 1955 Lehman Brothers sold its 50,000 shares of preferred stock, realizing in the aggregate the sum of $1,361,186.77 (R. 151a). On an investment of approximately one and one-third million dollars Lehman Brothers realized a profit of $30,386.77.

The District Court found as a fact that the purchase of the common stock of Tide Water by Lehman Brothers was made at the direction of the partners constituting the investment committee of the firm, of which Thomas was not a member; that Thomas was not consulted by his partners as to the proposed plan of recapitalization of Tide Water or the proposed purchase by Lehman Brothers of Tide Water stock; and that he was not consulted by them with reference to any of the affairs of Tide Water and said only that he believed Tide Water was a good company under good management (R. 150a).

The Court of Appeals affirmed the District Court's findings of fact (4a, 7a, 9a). Thus both lower courts have concurred in findings of fact that Thomas was not deputized to protect the interests of Lehman Brothers or to become its representative and that the Tide Water stock was bought and sold by the firm without consultation with Thomas, without his concurrence and without his advice. See *Graver Mfg. Co. v. Linde Co.*, 336 U. S. 271, 275 (1949), affirmed on rehearing, 339 U. S. 605 (1950).

As soon as Thomas learned of the firm's first acquisition of Tide Water common stock, he instructed the firm's controller " 'to exclude me from any risk of the purchase or any profit or loss from the subsequent sale and take the necessary steps to carry out my instructions.' " (4a). At a partnership meeting Thomas' partners agreed that he was not a part of the Tide Water transaction (5a).

Reasons for Denying the Writ

There are no special or important reasons for granting the writ of certiorari. The decision below was required by the clear words of the statute, is in accord with long standing precedent, and is not in conflict with other authorities. The decision was one of limited application, depending upon the facts of this case.

ARGUMENT

I

THE DECISION BELOW REPRESENTS A PLAIN APPLICATION OF THE STATUTE TO THE FACTS OF THIS CASE AND IS NOT IN CONFLICT WITH OTHER AUTHORITIES

The issue posed by petitioner arises under a federal statute which imposes liability upon a director for "any profit realized by him from any purchase and sale, or any sale and purchase, of any equity security of such issuer . . . within any period of less than six months . . ."

The words of the statute are clear and they are precise. The term director is defined in Section 3a(7) of the Securities Exchange Act to mean ". . . any director of a corporation or any person performing similar functions . . ." There was no proof that any of the 17 individual respondents other than Thomas was a director or fulfilled the functions of a director of Tide Water, and it is evident that Section 16(b) does not purport to cover them. Moreover, a provision in earlier drafts of the Securities Exchange Act to make liable any person who acted on confidential information disclosed by a director was eliminated from the statute as finally enacted. See *Smolowe* v. *Delendo Corporation*, 136 F. 2d 231, 236 (2d Cir. 1943), certiorari denied, 320 U. S. 751 (1943).

Petitioner's argument that Thomas himself, is liable for the profits realized by the other respondents is also directly contradicted by the plain words of Section 16(b). They impose liability upon a director only for profits "realized by him"; they do not impose liability upon a director for profits realized by others, whether they be friends, relatives, partners or others who may be close to him.

Petitioner argues that the Partnership Law of New York State made Thomas a co-owner with the other respondents of the securities purchased by Lehman Brothers. That argument ignores the finding that Thomas' capital was not at risk (4a) and it ignores the agreement between Thomas and his partners that he "was not a part of this Tide Water transaction at all" (5a). Petitioner's argument would not be pertinent even if Thomas had been an owner of the Tide Water securities because it is not the ownership of securities but the realization of profits which imposes liability. Thomas did not in any sense of the word realize the profits received by the other respondents, and under Section 52 of the Partnership Law of New York State he had no interest in their shares of the profits.*

The decision below is in exact accord with the precedent established in *Rattner* v. *Lehman Brothers*, 193 F. 2d 564 (2d Cir. 1952). There the defendant-partnership purchased and sold 5,000 shares of the common stock of the issuer within a period of six months while one of its partners was a director of the issuer. The court held that the partners of the partner-director were not liable for the firm's profits, stating at page 566:

> ". . . Section 16(b) contains no provision requiring the partners of a director to account for profits realized by them. The appellant argues that

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*Section 52 of the New York Partnership Law provides: "A partner's interest in the partnership is his share of the profits and surplus and the same is personal property."

> to construe the section so literally as to exclude them leaves a dangerous loophole in the statute. But the legislative history indicates that the omission of any provision for such liability was intentional . . ."

The court also held that the partner-director was not liable for more than his proportionate share of the firm's profits because the statute does not impose liability upon a director for profits realized by other persons.

Following the decision in *Rattner,* the Securities and Exchange Commission, in connection with an amendment of its Rule X-16A-3(b), issued Release No. 4754 on September 24, 1952 which states:

> ". . . The new rule X-16A-3 requires any person who is a member of a partnership which owns securities of an issuer of which he is an officer, director, or ten per cent stockholder to report all holdings and all changes in the beneficial ownership of equity securities of that issuer held by the partnership. *It is not intended as a modification of the principles governing liability for shortswing transactions under section 16(b) as set forth in the case of Rattner* v. *Lehman*, 193 F. 2d 564. . . ." (Emphasis supplied)

It is difficult to perceive how petitioner can so blandly argue that the amendment of Rule X-16A-3(b) constituted the enunciation of a doctrine contrary to *Rattner* in the light of the Commission's express words.

Moreover, Section 23(b) of the Securities Exchange Act imposes a duty upon the Commission to recommend to Congress legislation which it deems advisable. An examination of all the Commission's annual reports to Congress since the *Rattner* decision reveals that the Commission has made many recommendations to Congress for legislation to correct what it considered to be defects in the Securities Exchange Act of 1934; it does not reveal that the

Commission ever recommended that Congress amend Section 16(b) of the Act so as to impose the liability which petitioner claims should be imposed.

No decision in conflict with *Rattner* has been handed down by any court; and Congress, in the nine years since the decision in *Rattner*, has chosen not to amend the statute so as to impose the liability here contended for. See *Toolson* v. *New York Yankees, Inc.*, 346 U. S. 356 (1953).

Petitioner would also have this Court review the holdings of the Court of Appeals that the District Court's refusal to award interest on the judgment against defendant Thomas for his pro rata share of the partnership profits was not an abuse of discretion. In *Board of Commissioners* v. *United States*, 308 U. S. 343 (1939), this Court pointed out at page 352:

> ". . . The cases teach that interest is not recovered according to a rigid theory of compensation for money withheld, but is given in response to considerations of fairness. It is denied when its exaction would be inequitable. . . ."

Speaking with regard to a judgment under Section 16(b), the Court of Appeals, in accordance with the teaching of the *Board of Commissioners* v. *United States*, *supra*, has held that an allowance of interest from the time of realization of profit is not mandatory. See *Magida* v. *Continental Can Company*, 231 F. 2d 843, 848 (2d Cir. 1956), certiorari denied, 351 U. S. 972 (1956).

The decision not to award interest was a matter within the discretion of the District Court. The Court of Appeals held that the District Court's refusal to award interest in the circumstances of this case was not an abuse of that discretion (13a). A review of that holding is surely not the function of a writ of certiorari.

The decision below is based upon the concurrent findings of fact of two courts. It is squarely in accord with long established precedent which has been accepted by Congress, and in these circumstances review by this Court is unnecessary.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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